UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DENESE SHERVINGTON,

Plaintiff,

09 Civ. 4273

-against-

OPINION

VILLAGE OF PIERMONT, et al.,

Defendants.

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A P P E A R A N C E S:

Attorney for Plaintiff

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Sweet, D.J.

Defendants Village of Piermont (the "Village" or the "Village Defendants") and John Angelis ("Angelis") (collectively, the "Defendants") have moved pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss in part the complaint of Plaintiff Denese Shervington ("Shervington" or "Plaintiff") alleging violations of the Equal Protection Clause and the Due Process Clause of the Constitution, interference with Plaintiff's right to hold and sell real property in violation of 42 U.S.C. § 1982, and, under New York law, prima facie tort, negligence, fraud, intentional infliction of emotional distress and, in the case of the Village Defendants only, negligent hiring, training, retention, and supervision of Angelis. The alleged violations arose out of Angelis's inspection of Shervington's home. The motion does not address the allegations of fraud.

Based upon the conclusions set forth below, Defendants' motion is granted in part and denied in part. The Plaintiff is granted leave to replead in accordance with this opinion and order.

I. PRIOR PROCEEDINGS

The complaint in this action (the "Complaint") was filed on March 6, 2009 in Supreme Court, County of Rockland. A notice of removal was filed on May 1, 2009. Defendants moved to dismiss the Complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on June 26, 2009. Defendants' motion was heard and marked fully submitted on September 9, 2009.

II. PARTIES AND PLAINTIFFS' ALLEGATIONS

The following allegations, taken from the Complaint, are accepted as true for the purpose of resolving the motion to dismiss.

The Parties

Plaintiff Shervington is an African American female who owed real property located at 664 Piermont Avenue (the "Premises"), in the Village of Piermont, within the County of Rockland, New York.

Defendant Village of Piermont is a municipal corporation located within the County of Rockland, New York.

Defendant John Angelis, a resident of Rockland County, was employed as the Building Inspector of the Village of Piermont at all times mentioned herein.

Factual Background

Plaintiff purchased the Premises in March 2005, at which time there existed a finished basement that included a kitchen and a bathroom, installed at the time the house was constructed in 1999, in accordance with approved plans and permits, and meeting all applicable state and local building codes. Prior to the purchase, Plaintiff's title company requested a violation search of the Premises on her behalf. Defendant Angelis, acting within the scope of his employment as Building Inspector for the Village, informed the title company that no violations existed at the Premises.

In the Fall of 2007, Plaintiff entered into a contract by terms of which she agreed to sell the premises

to a third party purchaser. Pursuant to a request for violation information by the purchaser's title company, Defendant Angelis conducted an interior inspection of the premises. Angelis informed Shervington that illegal or unauthorized improvements had been made to the interior of the property, including but not limited to the basement being converted to a finished space, and the installation of a kitchen and bathroom therein. Angelis instructed Plaintiff that she should retain the services of a building contractor he would recommend to bring the premises into compliance. The Plaintiff refused to retain the contractor recommended by Angelis.

Angelis then informed Pplaintiff that the entirety of the construction in the basement had to be demolished, the framing and sheet rock destroyed, the electrical wiring and fixtures removed, and the insulation, plumbing, fixture and appliance removed. On December 10, 2007, the Village Defendants and Angelis issued to Plaintiff a Notice of Violation ordering her to commence the said demolition and threatening criminal prosecution unless the demolition was completed by December 28, 2007. Defendants refused to permit Plaintiff and her contractor to provide certified "as built" plans or otherwise

demonstrate that the work performed in the basement complied with state and local building codes, and instead insisted on the complete demolition and conversion of the basement to unfinished space.

Plaintiff was forced to delay closing of title on the sale of the premises to her purchaser. In order to remove the pending violations Plaintiff dismantled the basement construction causing her to expend large sums of money. Plaintiff was then required to rebuild the basement as previously constructed in order to honor the contractual obligation to her purchaser that the Premises would include the finished basement. As a result of the three-month delay in the sale of the Premises, Plaintiff had to reduce the sale price of the property, pay additional attorney's fees, carrying costs, and expenses for the Premises.

III. DISCUSSION

A. Rule 12(b)(6) Standard

On a motion to dismiss pursuant to Rule 12, all factual allegations in the complaint are accepted as true, and all inferences are drawn in favor of the pleader.

Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 235-36 (1974)).

However, while the pleading standard set forth in Rule 8 of the Fed. R. Civ. P. is a liberal one,

> the pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusion or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal citations and quotation marks omitted). Thus, a complaint must allege sufficient factual matter to "state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In meeting this "plausibility standard," the plaintiff must demonstrate more than a "sheer possibility" of unlawful action; pleading facts that are "'merely consistent with' a defendant's liability . . . 'stops short of the line

between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557); see also Reddington v. Staten Island Univ. Hosp., 511 F.3d 126, 131 (2d Cir. 2007) ("Although the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice. To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level." (internal quotation marks and citations omitted)); Gavish v. Revlon, Inc., No. 00-CV-7291, 2004 WL 2210269, at *10 (S.D.N.Y. Sept. 30, 2004) ("[B]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations and will not defeat a motion to dismiss.").

B. Plaintiff Has Sufficiently Impleaded the Village as a Defendant

Defendants argue that Plaintiff cannot establish a policy or custom of the Village which authorized Angelis's decision and behavior, as required by Monell v. Department of Social Services, 436 U.S. 658 (1978), to implead a government defendant. Id. at 694-95. However, municipal liability may be imposed for a single decision by a municipal policymaker under appropriate circumstances.

"If the decision to adopt a particular cause of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." Pembaur v. City of Cincinnati, 475 U.S. 469, 470 (1986). The Second Circuit Court of Appeals has left open the possibility that a building inspector's conduct could give rise to a Monell claim, even absent a general policy. Sullivan v. Town of Salem, 805 F.2d 81, 87 (2d Cir. 1986) (reversing summary judgment and remanding to the district court for determination of whether building inspector's acts were authorized by town policy). Furthermore, Monell was decided on the merits, not on a motion to dismiss. Given that no discovery has taken place, Plaintiff has been unable to determine the extent of Angelis's policymaking authority, or the extent to which the Village dictated the way in which Mr. Angelis made his determinations of violations.

C. Plaintiff Has Failed to State a Claim for Intentional Infliction of Emotional Distress

The Plaintiff's First Cause of Action states that Defendants "intentionally and with malice inflicted emotional distress upon the plaintiff, causing [her] to

suffer emotional trauma, stress, and pecuniary loss." Compl. ¶ 36. "To state a claim for intentional infliction of emotional distress, a plaintiff must allege (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." Emanuele v. Town of Greenville, 143 F. Supp. 2d 325, 335 (S.D.N.Y. 2001) (quoting Howell v. N.Y. Post Co., 81 N.Y.2d 115, 121 (1993)). "Liability occurs only where the conduct is so outrageous in character, so extreme in degree, as to be atrocious, to exceed all possible bounds of decency, and to be utterly intolerable in a civilized society." Id. (quoting Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 461 (1983)). New York courts have been strict in applying these standards. Id.

Plaintiff alleges that Angelis arbitrarily determined that the construction of her basement violated building codes and, when she would not use the contractor he suggested to her, required that the Premises had to be demolished. While such allegations, if true, would certainly indicate that Angelis had acted unprofessionally, and indeed irrationally, it is not conduct which is "so

extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Restatement 2d of Torts § 46, comment d.

D. Plaintiff Has Adequately Pleaded a Claim for Prima Facie Tort

Plaintiff's Second Cause of Action alleges a "tort per se" or prima facie tort. "The requisite elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." Rosa v Levinson, 2009 LEXIS Misc 2711, *8-9 (N.Y. Sup. Ct. Sept. 30, 2009) (quoting Freihofer v Hearst Corp. 65 N.Y.2d 135, 142-43 (1985)).

Here, the Complaint states that Angelis, under the authority of the Village, acted maliciously in requiring her to demolish her basement, and alleges special damages in the cost of its demolition and reconstruction. Angelis's conduct, if justified by the existence of actual violations, or his good faith belief that such violations

existed, would be lawful. Therefore the Plaintiff has adequately pleaded a claim for prima facie tort.

E. Plaintiff Has Adequately Pleaded a Claim Against Defendant Angelis for Common Law Negligence, But Has Failed to Sufficiently Plead Such a Claim Against the Village Defendants

Plaintiff's Fourth Cause of Action alleges that Defendants "negligently failed to observe that the improvements constructed in the basement of the Premises were legal, authorized and/or code compliant, and negligently ordered the demolition of the same." Compl. ¶ 43. To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries. Gordon v. Muchnick, 579 N.Y.S.2d 745, 746 (App. Div. 1992). A defendant must have owed a duty of reasonable care to the particular plaintiff; absent such a duty, there can be no breach thereof and no liability. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928). The determination of whether a duty exists is based on a careful inquiry whereby common sense, science, and policy play an important role in determining whether to impute liability for the damage suffered by one onto another.

Waters v. N.Y. City Hous. Auth., 505 N.E.2d 922, 923 (N.Y. 1987) (citing De Angelis v. Lutheran Med. Ctr., 449 N.E.2d 406, 407 (N.Y. 1987)).

In the instant case, Angelis had the sole responsibility to determine whether or not Shervington's house was compliant with building codes, and such responsibility was within the scope of his role as Building Inspector for the Village of Piermont. He inspected Plaintiff's property personally and held himself out as a person of relevant experience and adequate qualification to perform the inspection. He therefore owed her a duty of care in carrying out his inspection. According to the facts alleged in the Complaint, he breached this duty by failing to ascertain whether the structure in the basement had already been approved as code compliant or to take any reasonable measures to allow the Plaintiff to demonstrate this fact. Because of this breach, Plaintiff was forced to pay for the demolition and reconstruction of her basement and the kitchen and bathroom therein. The Plaintiff has therefore adequately pleaded a claim for negligence against Angelis.

However, a different standard exists for determining negligence on behalf of a municipality. "With

respect to members of the general public, no liability attaches for a violation of a general duty owed by the town to the public at large. The issuance of a certificate of occupancy and/or a building permit is a governmental function for which a municipality may not be held responsible for damages." Okie v. Village of Hamburg, 196 A.D.2d 228, 231 (N.Y. App. Div. 1994) (internal citations and quotation marks omitted). A municipality may only be held liable when a "special relationship" exists between it and the injured party. Such a relationship exists when there has been "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking." Taunus Corp. v. City of New York, 279 F. Supp. 2d 305, 310 (S.D.N.Y. 2003) (quoting Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987)). See also Okie, 196 A.D.2d at 232 (finding negligence when "the municipality has violated a duty commanded by a statute enacted for the special benefit of particular persons; where the municipality has voluntarily

assumed a duty, the proper exercise of which was justifiably relied upon by persons benefited thereby; or where it assumes positive direction and control under circumstances in which a known, blatant and dangerous safety violation exists." (internal citations omitted)).

As determined in Okie, the responsibility to issue a certificate of occupancy when a residence meets certain statutorily defined standards is not a responsibility voluntarily assumed or statutorily delineated which the municipality owes to a particular person, but rather an obligation owed to the entire community. Accordingly, no special relationship exists between Plaintiff and the Village, and therefore no duty of care was at issue under these circumstances.

Plaintiff's claim for negligence stands as to Defendant Angelis but is dismissed as to the Village Defendants.

F. Plaintiff Has Failed to State a Cause of Action for Negligent Hiring, Training, Supervision, or Retention

Plaintiff's Fifth Cause of Action alleges that the Village was negligent in hiring, training, retaining, and

supervising Angelis because they knew or should have known that he "was prone to acting in an improper, arbitrary, malicious, and unlawful manner." Compl. ¶ 46. A necessary element of negligent hiring, retention, or supervision claims is that the employer had reason to know about the employee's tendency to behave in such a way that caused the injury. See Kenneth R. v. Roman Catholic Dioceses, 229 A.D.2d 159, 163 (N.Y. App. Div. 1997); Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 A.D.3d 875, 878 (N.Y. App. Div. 2006). The Complaint does not allege any facts suggesting a pattern of Angelis's conduct that would have alerted the Village to his propensity for such behavior. Although the Plaintiff refers in her memorandum of opposition to Defendants' motion to letters to the Village Defendants alleging Angelis's unprofessional conduct, those letters are dated after the events at issue in the Complaint. Therefore, even if they could be relied on for the purposes of a motion to dismiss, see Section III(G) infra, they do not indicate that the Village had notice of Angelis's behavior before he performed Shervington's inspection, and certainly would not be grounds for a negligent hiring claim as they all occurred after he had been hired. Therefore, Plaintiff's claim for negligent hiring, training, supervision and retention is dismissed.

G. Plaintiff Fails to Allege a Violation of her Right to Equal Protection

Plaintiff's Sixth Cause of Action alleges that "defendants treated [her] differently than white or male persons in the same situation, by forcing her to remove lawful and/or code compliant improvements and not forcing other individuals to do the same." Compl. ¶ 49.

She makes her allegations under the Equal Protection Clauses of the United States and New York Constitutions. However, the analysis below is contained to the federal Constitution as her federal allegation is that which allows this Court to take jurisdiction.

The Equal Protection Clause requires that State actors should treat "all persons similarly situated . . . alike." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). To succeed on an Equal Protection claim pursuant to 42 U.S.C. § 1983, the Plaintiff is required to show "purposeful discrimination directed at an identifiable or suspect class." Giano v. Senkowski, 54 F.3d 1050, 1056 (2d Cir. 1995) (internal citations omitted). "To prevail on a claim of selective enforcement, plaintiffs in this

Circuit traditionally have been required to show both (1) that they were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (internal quotation marks omitted).

The Complaint does not establish how Plaintiff was selectively treated, or give any grounds for establishing that such treatment was based on impermissible considerations, other than stating that she belongs to a protected class of persons. Nor does it identify any persons who were given a certificate of occupancy for a property on which Angelis determined that there were violations, or that Angelis had adjudged previous properties constructed similarly to Shervington's to be free from violations, or that Angelis had permitted more moderate measures than demolition to allow for inspection of the construction of properties found to have violations. As such, she has failed to plead any facts which would support her claim under the Equal Protection Clause.

Plaintiff does include with her moving papers an affidavit in which she states that Angelis referred to her as an "ignorant woman" when she said that she had only relied on the previous owners' construction standards, which had been approved by the Village inspectors. Shervington Aff. ¶ 13. However, that affidavit does not provide grounds to believe that his decision not to issue the violation was based on his consideration of her gender or that he was motivated by any prejudice against women. Additionally, while affidavits attached to the complaint may be considered on a motion to dismiss, see Cortec v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991), a complaint cannot be modified by a party's affidavit or by papers filed in response to a motion to dismiss, Wright v. Ernst & Young, LLP, 152 F.3d 169, 178 (2d Cir. 1998) (party may not allege new facts in statements made in briefs). Whether or not the finding of violations in Shervington's home was merited, the Complaint does not establish that she was treated differently from other similarly situated people, or that her treatment was based on her identity as an African American woman.

Accordingly, Plaintiff's claim for a violation of the Equal Protection Clause is denied.

H. The Plaintiff Has Failed to Adequately Plead a Claim for Obstruction of the Right to Hold and Sell Real Property

Plaintiff's Seventh Cause of Action alleges that Defendants "interfered with and obstructed plaintiff's right to hold and sell real property in violation of 42 U.S.C. § 1982." Compl. ¶ 51. Section 1982 guarantees all citizens the right to inherit, purchase, lease, sell, hold, and convey real and personal property. It also prohibits discrimination in the sale or rental of property. Prompt Couriers Servs. Inc. v. Koch, No. 89-CV-3053, 1990 WL 100904, at *6 (S.D.N.Y. July 13, 1990) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968)). Section 1982 only prohibits discrimination on the basis of race. See CBOCS WEST, Inc. v. Humphries, 128 S. Ct. 1951, 1968 (2008) (Thomas, J., dissenting); see also Puglisi v. Underhill Park Taxpayers Ass'n, 947 F. Supp. 673, 684, 686 (S.D.N.Y. 1996). Section 1982 deals specifically with racial discrimination and is not a comprehensive law against discrimination "in the provision of services or facilities in connection with the sale or rental of a

dwelling." Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., et al., 447 F. Supp. 838, 843 (E.D.N.Y. 1978) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. at 413-14)(1968)).

A complaint alleging discrimination under § 1982 "must specifically allege an intent to discriminate on the basis of race by the defendant." Sanders v. Grenadier Realty, Inc., No. 08-CV-3920, 2009 WL 1270226, at *2 (S.D.N.Y. May 6, 2009) (quoting Jones v. Nat'l Commc'n & Surveillance Networks, 409 F. Supp. 2d 456, 470 (S.D.N.Y. 2006)). To state a prima facie case of discrimination under § 1982, the plaintiff must allege that she was deprived of a property right because of her race and that the race based deprivation was intentional. Jones v. Alfred H. Mayer Co, 392 U.S. at 436. Merely stating membership in a racial minority and nothing more is not sufficient to survive a motion to dismiss. See Jones v. Nat'l Commc'n, 409 F. Supp. 2d at 470-71.

As has already been determined, the Complaint does not allege facts which suggest intentional discrimination, or discrimination of any kind, as a result

of the plaintiff's racial identity. Therefore Plaintiff's claim under § 1982 is dismissed.

I. Plaintiff Has Not Established a Cause of Action for Denial of Procedural Due Process But Has Sufficiently Pleaded a Claim for Denial of Substantive Due Process

Plaintiff's Eighth Cause of Action alleges that Defendants violated her right to procedural and substantive due process.

She makes her allegations under the Equal Protection Clauses of the United States and New York Constitutions. However, the analysis below is contained to the federal Constitution as her federal allegation is that which allows this Court to take jurisdiction.

Plaintiff's claim that she was denied procedural due process overlooks the fact that she opted not to pursue an Article 78 proceeding in New York State courts, a procedural step that was available to challenge Angelis's decision. An Article 78 proceeding is a hearing through which "challenges may be made to determinations rendered by governmental bodies and agencies which are 'in violation of lawful procedure, . . . affected by an error of law, or

[are] arbitrary and capricious or an abuse of discretion.'" Hughes Vill. Rest., Inc. v. Vill. of Castleton-on-Hudson, 46 A.D.3d 1044, 1046 (N.Y. App. Div. 3d Dep't 2007) (quoting N.Y. C.P.L.R. § 7803). New York Village Law § 7-712(b)(1) also permits a local board of appeals to review a decision of an administrative official such as a building inspector.

The Second Circuit Court of Appeals has held "on numerous occasions that an Article 78 proceeding is a 'perfectly adequate post-deprivation remedy in situations' involving claims of deprivations of liberty or property interests where such deprivations result from random and arbitrary acts of state employees." Federico v. Bd. of Educ. of the Public Schs. of the Tarrytowns, 955 F. Supp. 194, 201 (S.D.N.Y. 1997) (quoting Hellenic Am. Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 881 (2d Cir. 1996)); see also Spang v. Katonah Lewisboro Union Free Sch. Dist., 626 F. Supp. 2d 389, 397 (S.D.N.Y. 2009); Rivera v. Comty Sch. Dist., No. 00-CV-8208, 2002 WL 1461407, at *6 (S.D.N.Y. July 8, 2002).

The proper procedural response to Plaintiff's impression that Angelis denied her due process by making an

arbitrary and capricious decision was to challenge that action in an Article 78 proceeding. As this procedure was available to her, Plaintiff has not demonstrated that she was deprived of procedural due process. See Federico, 955 F. Supp. at 202.

Plaintiff also claims that the Defendants' actions denied her substantive due process. Substantive due process has been characterized as imposing limits on state action regardless of what procedural protection is provided. Substantive due process analysis requires (1) identifying the constitutional right at stake, and (2) a consideration of whether the state-action was arbitrary in the constitutional sense. Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) ("[S]ubstantive due process protects against governmental action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense."). The constitutional right at stake is Plaintiff's property interest in her home. As to the second consideration, the Second Circuit has explained the standards of substantive due process are violated by "conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Harlen Assocs. v. Vill. Of

Mineola, 273 F.3d 494, 505 (2d Cir. 2001) (internal citations and quotation marks omitted).

Plaintiff alleges that Angelis groundlessly determined that there were violations in the construction of her basement kitchen and bathroom, and insisted that it be demolished rather than brought into compliance when she refused to hire a contractor he recommended. The Village subsequently sent a letter ordering her to commence the demolition or face criminal prosecution. Such behavior, if proven, plainly would meet the standard in Lowrance, 20 F.3d at 537, and constitute "a gross abuse of governmental authority." Harlen, 273 F.3d at 505.

Accordingly, Plaintiff's claim for procedural due process violation is dismissed but her claim for a violation of substantive due process stands.

Conclusion

In light of the foregoing facts and conclusions, Defendants' motion is granted in part and denied in part.

The Plaintiff is granted leave to replead in accordance with this opinion and order.

It is so ordered.

New York, New York

January 7 , 2010

ROBERT W. SWEET
U.S.D.J.